84-94

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YACHTS AMERICA, INC., AND
THOMAS BRUCE WILSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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July 13, 1982

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Did Pub. L. 93-444 initially or as amended by Pub. L. 94-578 grant to the Petitioners the right to remain at the Fort Washington Marina indefinitely and the right to be treated as a concession by the National Park Service?

2. Did Pub. L. 94-578 take or result in a taking of Petitioners' vested right to an orderly termination without just compensation and in violation of the fifth amendment of the Constitution, when the Court of Claims denied Petitioners' just compensation and endorsed Petitioners' right to remain on the property indefinitely and be treated as a concession, but where the District Court evicted Petitioners from the premises notwithstanding Petitioners' rights as set forth by the Court of Claims?

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Petitioners, Yachts America, Inc. and Thomas Bruce Wilson, (hereinafter petitioners) respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia to review and reverse a decision by that Court entered on April 16, 1984, affirming the judgment of the District Court with regard to Petitioners' claim for declaratory and injunctive relief (Counts I and II of the Complaint).

OPINIONS BELOW

The decision of the Court of Appeals is reproduced as Appendix E, and is unreported. The Memoranda and Orders of the District Court are reproduced in Appendixes C and D; these Orders are not reported.

JURISDICTION

The Judgment of the Court of Appeals was made on April 16, 1984. This Petition is filed within ninety (90) days of the Judgment. Petitioners seek to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves a legislative taking of property and the right to an "orderly termination" pursuant to Pub. L. No. 93-444, Stat. 1304 (1974), amended by Sec. 305, Pub. L. No. 94-578, 90 Stat. 2732 (1976), both reproduced here in Appendix A. Also involved is that portion of the United States Constitution, Amendment V, regarding the taking of property without just compensation set forth below:

> " . . . nor shall private property be taken for public use, without just compensation."

Also involved are Sections 20b and 20d of the Concessions Policy Act of 1965, 16 U.S.C. § 20 *et seq.*

STATEMENT OF THE CASE

At the time of enactment of Pub. L. No. 93-444, October 15, 1974, the Petitioners were the operators of the Fort Washington Marina (hereafter "Marina"), known as Parcel D therein. That law provided that the Secretary of the Interior "shall allow for the orderly termination of all operations on real property acquired by the United States in Parcels A, B, C and D of this subsection and for the removal of equipment, facilities and personal property therefrom."

Petitioners requested Respondent (acting as the National Park Service, hereafter NPS) to grant a permit or agreement under which they might be able to avail themselves of an "orderly termination" of their operations at

the Marina and the removal of their equipment, facilities and personal property therefrom in accordance with Pub. L. No. 93-444. More than one year after the taking, NPS offered a contract which was unacceptable to Petitioners, as it did not provide an orderly termination of the Petitioners' operations as provided by Pub. L. No. 93-444.

Pub. L. No. 94-578 was enacted October 21, 1976, and modified Pub. L. No. 93-444 by deleting Parcel D (the Marina) from the aforementioned "orderly termination" clause.

Prior to the enactment of the amendment, NPS considered the Marina subject to the "orderly termination" provisions of the first law. Thereafter, NPS took the position that the "operators" and the operations at the Marina were not entitled to an "orderly termination" or to remove their equipment, facilities and personal property.

Petitioners filed a three count petition in the Court of Claims in June, 1979, Case No. 279-L, for just compensation. Count III related to the denial or taking of an orderly termination, first by NPS action and second, by the enactment of Pub. L. No. 94-578.

Concerning "orderly termination," the Court of Claims ignored the language of the first law and interpreted the "orderly termination" provisions of Pub. L. No. 93-444 contrary to its clear meaning. The Court further ruled that the Petitioners should have been treated as a concessioner and in the concurring portion of the dissent also stated that the Petitioners could remain at the Marina indefinitely. *Yachts America* v. *United States*, 673 F.2d 356, at 364 and 366 and Appendix p. 20(a) and pp. 22(a), 23(a). Petitioners filed a Petition for a Writ of Certiorari to this Court, which then was denied. *Ibid*, 103 S. Ct. 86.

The NPS refused to permit Petitioners to remain at the Marina indefinitely or to treat them as a concession. Petitioners sought equitable relief in the District Court to require NPS to deal with them as with any other concession and to enjoin NPS from removing Petitioners from the Marina.

THE DECISION BELOW

The Judge in the District Court ruled there was no violation of statute and that Petitioners did not have the right to stay at the Marina indefinitely or to be treated as a concession (Appendix D, p. 29(a)), and thus were not entitled to the interlocutory relief prayed. The Court of Appeals affirmed without comment (Appendix E, p. 32(a)). Thereafter this Petition for a Writ of Certiorari was filed.

REASONS FOR GRANTING THE WRIT

This case presents serious and novel questions as follows:

1) The interpretation of Federal Statute, Pub. L. No. 93-444, *supra*, amended by Pub. L. No. 94-578.

2) The Court of Claims and the Court of Appeals for the District of Columbia have rendered conflicting opinions on the interpretation of this law.

3) The result of the conflicting opinions is a violation of the fifth amendment of the Constitution regarding taking property without just compensation and a denial of Petitioners' rights under Pub. L. No. 93-444, as amended.

4) This is a case of first impression.

I.

PUB. L. NO. 93-444 GRANTED PETITIONERS THE RIGHT TO REMAIN AT THE MARINA INDEFINITELY AND REQUIRED NPS TO TREAT PETITIONERS AS A CONCESSION

In Count III of Court of Claims Case No. 239-79L, the Petitioners sought just compensation for the taking of their right to an orderly termination of operations at the Marina as set forth in Pub. L. No. 93-444; The Court of Claims ruled that the Law never granted such a right (notwithstanding its clear language) and that therefore Pub. L. No. 94-578 took nothing. *Yachts America* v. *United States*, *supra*, at p. 364, Appendix p. 19(a), 20(a). The Court of Claims rationale was clearly set forth as follows:

> "The implication, obviously, is that Yachts' existing operation was to be dealt with as would other concessions on National Park Service Land", *supra*, at p. 364, Appendix p. 19(a), 20(a).

and further, in the concurring (in part) opinion as follows:

> "Count III is based upon plaintiffs' theory that Pub. L. No. 93-444 cut off the right to 'orderly termination', i.e. indefinite occupation of the site by the plaintiffs. *We* have concluded that it was meant to permit plaintiffs to occupy indefinitely." *supra*, at p. 366, Appendix p. 22(a) and 23(a).

Only in this fashion, by permitting Petitioners to stay indefinitely and treating them as a concession could the Court of Claims explain in the first instance why Petitioners were not entitled to an "orderly termination" and in the second instance, why the denial of an orderly termination did not require just compensation. The Court of Claims rationale was clearly that indefinite occupancy and treatment as a concession stood in lieu of and as an alternative to "orderly termination" and just compensation.

Because the language of Pub. L. No. 93-444 regarding the Marina (Parcel D) and "orderly termination" was so clear, Petitioners filed a Petition for a Writ of Certiorari to this Court, which was denied, *supra*. The result of this denial is tacit affirmation of the prior Court of Claims decision.

When NPS did not treat Petitioners as a concession and indicated it intended to remove Petitioners from the Marina, Petitioners were to lose what little the Court of Claims had left them in lieu of "orderly termination." Petitioners sought to protect their statutory rights as explained by the Court of Claims and sought injunctive relief in the District Court below.

II.

THE DECISION OF THE COURT OF APPEALS BELOW CONTRADICTS THE DECISION OF THE COURT OF CLAIMS INVOLVING THE SAME STATUTE, ISSUE AND PARTIES

The District Court ruled that there was no violation of Petitioners' statutory right. (App. p. 29(a)). The Court of Appeals affirmed. (App. p. 32(a)). These rulings are contradictory to the ruling in and rationale of the Court of Claims decision. *Yachts America* v. *United States*, *supra*.

The rulings below taken at face value say that Petitioners have no right to be treated as a concession and have no right to remain indefinitely. However, if Petitioners do not have these rights, then their operations at the Marina were to be terminated and then Pub. L. No. 93-444 grant of a right to an orderly termination and removal of equipment, facilities and personal property was in fact taken by the enactment of Pub. L. No. 94-878. This, however, has been previously denied by the Court of Claims.

The net results of these conflicting decisions are that of all operators of property taken pursuant to Pub. L. No. 93-444:

a) only Petitioners were denied "orderly termination" and the right to remove their equipment, facilities and personal property;

b) only Petitioners were not given just compensation for the taking of their orderly termination, equipment, facilities and personal property;

c) only Petitioners were told by one Court that they could stay at the Marina and be treated as a concession and by another Court that they had no such right.

In essence, NPS has won this case both ways. First, it did not have to pay Petitioners for the taking of their right to an orderly termination, which was clearly stated in Pub. L. No. 93-444. Second, as a consequence of the ruling of the Court below, it does not have to permit Petitioners to remain at the Marina and to treat Petitioners as a concession, as ruled by the Court of Claims when denying just compensation for the orderly termination of Petitioners' operations.

III.

THE CONFLICT OF DECISIONS RESULTS IN A TAKING WITHOUT JUST COMPENSATION

NPS has taken the position that the operation of Petitioners at the Marina has not been that of a concession, notwithstanding the clear language of the Court of Claims' decision saying that Petitioners' operations were to be treated as a concession.

If Petitioners' operations were not to be treated as a concession and if Petitioners were not to be permitted to remain indefinitely, then Pub. L. No. 93-444, by its clear language, granted them an orderly termination, which

right was taken from and denied to petitioners. The Court of Claims has explained that Petitioners were not entitled to just compensation for that taking because they are entitled to be treated as a concession and to stay indefinitely. Justice requires that Petitioners either be paid just compensation for the taking of orderly termination (which has been denied in the Court of Claims) or that Petitioners' operations at the Marina not be terminated and that they be treated as a concession.

NPS does not wish to pay for the "orderly termination," but still desires to terminate petitioners operations. As a consequence of the conflicting decisions, NPS is succeeding in denying Petitioners both just compensation and statutory rights.

CONCLUSION

Only in this Court can the decisions below be reconciled and Petitioners granted consistent relief in the various Courts below.

For these reasons, a Writ of Certiorari should issue to review the Opinion and Order of the Court of Claims.

Respectfully submitted,

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APPENDIX

APPENDIX A

(1)

LAND PRESERVATION—MARYLAND PUBLIC LAW 93-444; 88 STAT. 1304

[H.R. 4861]

An Act to amend the Act of October 4, 1961, providing for the preservation and protection of certain lands known as Piscataway Park in Prince Georges and Charles Counties, Maryland, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Act of October 4, 1961 (75 Stat. 780), providing for the preservation and protection of certain lands in Prince Georges and Charles Counties, Maryland, as amended, is amended as follows:

(a) In section 2(b), amend the first sentence by striking out "drawing entitled 'Piscataway Park,' numbered NCR 69.714-18, and dated January 25, 1966," and inserting in lieu thereof "drawing entitled 'Piscataway Park,' numbered PIS-P-90,000, and dated July 19, 1974."

(b) In section 2(b), delete the words "The property herein described is more particularly depicted on the drawing numbered 1961-1, a copy of which is on file with the Secretary of the Interior."

(c) In section 2(c), delete the first sentence and insert in lieu thereof the following: "Effective on the date of enactment of this Act, there is hereby vested in the United States all right, title and interest in, and the right to immediate possession of, all real property within the boundaries of the parcels designated A, B, C, and D, as shown on the drawing referenced in subsection 2(b). The United States will pay just compensation to the owners of any property taken pursuant to this subsection and the

full faith and credit of the United States is hereby pledged to the payment of any judgment so entered against the United States. Payment shall be made by the Secretary of the Treasury from moneys available and appropriated from the Land and Water Conservation Fund, subject to the appropriation limitation contained in section 4 of this Act, upon certification to him by the Secretary of the Interior of the agreed negotiated value of such property or the valuation of the property awarded by judgment, including interest at the rate of six (6) per centum per annum from the date of taking to the date of payment therefor. In the absence of a negotiated settlement or an action by the owner within one year after the date of enactment of this Act, the Secretary may initiate proceedings at any time seeking a determination of just compensation in a court of competent jurisdiction. The Secretary shall allow for the orderly termination of all operations on real property acquired by the United States in parcels A, B, C, and D of this subsection, and for the removal of equipment, facilities, and personal property therefrom: *Provided*, That in no event shall the Secretary allow operations at the Marshall Hall Amusement Park to continue beyond January 1, 1980. The Secretary shall, on lands acquired for the purposes of this park, implement a development plan which will assure public access to, and public use and enjoyment of, such lands. To further the preservation objective of this Act, the Secretary of the Interior may accept donations of scenic easements in the land within the area designated as 'Scenic Protection Area' on the drawing referred to in subsection (b) of this section."

(d) In section 4, delete "$5,657,000" and insert "$10,557,000." Approved Oct. 15, 1974.

(2)

NATURAL PARK SYSTEM—APPROPRIATION LIMITATIONS

An Act to provide for increases in appropriation ceilings and boundary changes in certain units of the National Park System, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE III—MISCELLANEOUS PROVISIONS

Sec. 305. Section 2(c) of the Act of October 4, 1961 (75 Stat. 780), providing for the preservation and protection of certain lands in Prince Georges and Charles Counties, Maryland, as amended (88 Stat. 1304), is further amended by changing the fifth sentence by deleting "parcels, A, B, C, and D" and inserting in lieu thereof "parcels A, B, and C."

* * *

APPENDIX B

In the United States Court of Claims

No. 239-79L
(Decided February 24, 1982)

YACHTS AMERICA, INC., AND
THOMAS BRUCE WILSON
v.
THE UNITED STATES

Stephen Leventhal, attorney of record, for plaintiffs. *Dorothy R. Burakreis*, with whom was *Assistant Attorney General Carol E. Dinkins*, for defendant. *Carolyn p. Osolinik* and *Thomas S. Jackson*, *Patricia D. Gurne*, and *Jackson, Campbell & Parkinson, P.C.*, of counsel.

Before Cowen, *Senior Judge*, Nichols and Kashiwa, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS" MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

KASHIWA, *Judge*, delivered the opinion of the court:

This case is before the court on defendant's motion for summary judgment and on plaintiffs' motion for partial summary judgment. After considering the parties' submissions and oral argument, we deny in part plaintiffs' motion for partial summary judgment, allow in part defendant's motion for summary judgment, and remand the remainder of the case to a trial judge for further determination.

Plaintiffs are Yachts America, Inc. (Yachts) and Yachts' president, Thomas Wilson. In October 1972, Yachts leased some eight acres of marina property along the Potomac River in Maryland from Fort Washington Marina, Inc. (Fort Washington). The leasehold was for a two-year period begining November 1, 1972, at a monthly rental of $6,000. The lease allowed Yachts an option, exercisable prior to July 31, 1974, to purchase the marina property. The lease contained no provision allocating condemnation proceeds but did specify the leasehold would terminate if Yachts, pursuant to a governmental taking, was required to surrender possession of the premises.

The relationship between Yachts and Fort Washington was far from harmonious. Ultimately, Yachts brought at least three actions against its landlord. One action for breach of the lease agreement was filed November 30, 1973, in the Circuit Court for Prince George's County, Maryland, as Legal Action No. 56019 (the first breach suit). The first suit originally alleged Fort Washington had violated the lease by requiring excessive fire insurance, failing to pay for certain sewer improvements, and encumbering the marina property. Ultimately, the first breach suit also alleged Fort Washington violaged the lease by not selling the marina property to Yachts. A second breach suit identical to the first was subsequently filed as Legal Action No. 5665 in the Circuit Court for St. Mary's County, Maryland. The date of the second breach suit's filing is unclear from the record.

In a third suit, Prince George's County Circuit Court Equity Action No. D-8967, Yachts sought ownership of the marina property (referred to hereafter as the equity action or the equity litigation). The filing date of the equity action is also not set forth in this record. Equity Action No. D-8967 alleged that Yachts had properly exercised the purchase option, that Fort Washington had

not performed, and that Yachts was entitled to have the property conveyed.

While these lawsuits were pending, the United States became the owner of the marina property on October 15, 1974, through Pub. L. No. 93-444, 88 Stat. 1304 (1974). In relevant part, Pub. L. No. 93-444, *supra*, provides:

> * * * "Effective on the date of enactment of this Act, there is hereby vested in the United States all right, title and interest in, and the right to immediate possession of, all real property within the boundaries of the parcels designated A, B, C, and D, as shown on the drawing referenced in subsection 2(b). The United States will pay just compensation to the owners of any property taken pursuant to this subsection and the full faith and credit of the United States is hereby pledged to the payment of any judgement so entered against the United States. Payment shall be made by the Secretary of Treasury from moneys available and appropriated from the Land and Water Conservation Fund, subject to the appropriation limitation contained in section 4 of this Act, upon certification to him by the Secretary of the Interior of the agreed negotiated value of such property, or the valuation of the property awrded by judgment, including interest at the rate of six (6) per centum per annum from the date of taking to the date of payment therefor. In the absence of a negotiated settlement or an action by the owner within one year after the date of enactment of this Act, the Secretary may initiate proceedings at any time seeking a determination of just compensation in a court of competent jurisdiction. The Secretary shall allow for the ordely termination of all operations on real property acquired by the United States in parcels A, B, C, and D of this subsection, and for the removal of equipment, facilities, and personal property therefrom: *Provided*, That in no event shall the Secretary allow operations at the Marshall Hall Amusement Park to continue beyond January 1, 1980. The Secretary

> shall, on lands acquired for the purposes of this park, implement a development plan which will assure public access to, and public use and enjoyment of, such lands. To further the preservation objective of this Act, the Secretary of the Interior may accept donations of scenic easements in the land within the area designated as 'Scenic Protection Area' on the drawing referred to in subsection (b) of this section."
>
> * * * * *

The marina property was located within Parcel D and thus originally was subject to the orderly termination provision. Parcel D subsequently was exempted from that provision by section 305 of Pub. L. No. 94-578, 90 Stat. 2732 (1976). In June 1975, the United States and Fort Washington negotiated $750,000 as compensation for Parcel D. In recognition of Yachts' then pending litigation and two mortgages of the property, the $750,000 was paid into escrow.

On October 8, 1975, Fort Washington and Yachts settled their disputes. In the settlement agreement, a mutual release, each party agreed in broad languages to:

> * * * release and forever discharge each other mutually and reciprocally, from all claims, demands, and causes of action that they now have or that might subsequently accrue to them arisin out of or connected with, directly or indirectly, the aforementioned [lease] agreements between the parties, including, but not limited to, all claims, actions, or issues, as set forth in the litigation between the parties known as Law No. 56019, in the Circuit Court for Prince George's County, Maryland, Law No. 5665, in the Circuit Court for St. Mary's County, Maryland, and Equity No. D-8967, in the Circuit Court for Prince George's County, Maryland.

Fort Washington also agreed to allow a $300,000 judgment to be entered in favor of Yachts and against Fort

Washington. A contemporaneous consent decree in the equity action entered the $300,000 judgment in favor of Yachts and against Fort Washington, denied Yachts specific performance, and dismissed with prejudice all other claims and issues in that litigation. In separate proceedings, Yacths' breach actions were voluntarily dismissed with prejudice. Shortly after the actions were settled, Fort Washington became insolvent.

In June 1976, Yachts brought suit in federal district court against the United States, Fort Washington, and the escrow agent holding the $750,000. Count I of that petition alleged Pub. L. No. 93-444, *supra*, was unconstitutional in scope and purpose, while Count II alternatively sought just compensation for Yachts' purported ownership of the marina property. Eventually, the United States was granted summary judgment as to Count I. Further, the district court held all claims by Yachts against Fort Washington barred by res judicata arising from the state court consent decree. Yachts then secured voluntary dismissals without prejudice as to its remaining district court claims. In the interim since the district court dismissals, the $750,000 held in escrow has apparently been disbursed to Fort Washington's creditors other than Yachts. Yachts' $300,000 judgment against Fort Washington remains unsatisfied.

The petition in this court was filed in June 1979 and alleges three broad causes of action for just compensation. For simplicity's sake, we refer to these as Count I, Count II, and Count III. In a counterclaim, defendant seeks rent for Yachts' occupancy of the marina property since the date of taking.

I.

Count I of the petition appears to state two claims for just compensation. One claim is that compensation is

owed for Yachts' alleged equitable ownership of the marina property. We refer to this as the Count I ownership claim. The second claim in Count I is that regardless of the property's ownership, a compensable taking of Yachts' business has occurred. We refer to this as the Count I business claim.

The parties' efforts thus far have centered largely on whether the Count I ownership claim is barred by either res judicata or collateral estoppel. Indeed, the record and argument as to the Count I business claim are so scant that as to that claim, we must deny either party summary judgment and remand to a trial judge for further determination. As to the Count I ownership claim, we turn first to the Government's assertion of collateral estoppel.[1]

Under the Government's view, collateral estoppel now bars plaintiffs from relitigating an essential element of the Count I ownership claim, *viz.*, whether Yachts obtained equitable ownership through a July 1974 exercise of the purchase option. If plaintiffs are indeed unable to assert ownership, the Count I claim for a taking of that ownership will necessarily fail.

Collateral estoppel bars the relitigation of issues that have been adjudicted in a previous suit. *E.g.*, *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948); *Berdick* v. *United States*, 222 Ct. Cl. 94, 101-104, 612 F.2d 533, 537-538 (1979); *McGinty* v. *United States*, 151 Ct. Cl. 399,

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[1] The United States was not a party to the breach suits or the equity action between Yachts and Fort Washington, nor was there a decision on the merits of Yachts' district court claim for just compensation. It thus appears the United States can claim res judicata only as a privy to Fort Washington in the equity litigation. In light of our conclusion, *infra*, that collateral estoppel precludes the Count I ownership claim, we expressly decline to reach the res judicata issue.

403 (1960), *cert. denied*, 368 U.S. 867 (1961). At one time, collateral estoppel was limited by the mutuality doctrine to circumstances where both parties in the second suit were litigants in the first suit and thus mutally bound by the previous judgement. *See Triplett* v.297 u.S. 638, 642 (1936). In a line of cases begining with *Blonder-Tongue Labrotories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971) the Supreme Court has rejected the requirement of mutuality. Other notable cases in the progression include *Parkland Hosiery Co. v. Shore*, 439 U.S. 322 (1979), and *Montana v. United States*, 440 U.S. 147 (1979).

In *Carter-Wallace, Inc. v. United States*, 204 Ct. Cl. 341, 496 F. 2d 535 (1974), we identified the considerations relevant when collateral estopple is sought in post-*Blonder-Tongue* patent litigation. In *Carter-Wallace, supra*, we said:

> * * * The guidelines suggested by the Supreme Court [in *Blonder-Tongue*] require that once the defense of estoppel is raised by the accused infringer, the court must first consider whether the issue of invalidity common to each action is substantially identical and whether in the earlier suit the patentee had had a full and fair opportunity to litigate the issue of invalidity (402 U.S. at 333). This determination of fairness, said the Court, must be based on an examination of the patentee's incentive to litigate the prior action, his choice of forum, his ability to procure crucial evidence and witnesses for that trial, and other factors, for instance, if the issue is non-obviousness, whether the first court adhered to prior guidelines established by the Court in determining patent validity. It is significant that the Court placed the burden on the plaintiff-patentee to show that he did not have a full and fair opportunity to litigate. [204 Ct. Cl. at 348, 496 F.2d at 538-539.]

Similar guidelines are now applicable to all litigation in this court. *See, e.g., Monterey Life Systems, Inc.* v.

United States, 225 Ct. Cl. ____, ____, 635 F.2d 821, 826-827 (1980). We thus need not consider whether the United States would meet the former mutuality requirement.

It is apparent that if collateral estoppel is present here, it can arise only as to issues determined by the consent decree in the equity action. The federal district court's decision that the taking Act was constitutional determined no issues relevant to the Count I ownership claim. Likewise, its decision that Yachts' claims against Fort Washington became res judicata in the equity action necessarily resolved no issue not determined by the equity action consent decree. We turn, therefore, to the equity litigation.

Yacht's bill of complaint in Equity Action No. D-8967 alleged it had entered a lease agreement with Fort Washington. The bill of complaint further alleged:

2. That this same Lease Agreement provided the plaintiff an option to purchase the said property pursuant to a Sales Agreement which was attached to the said Lease Agreement and is attached hereto, the terms of which are incorporated herein, and which is marked Exhibit 2.

* * * * *

4. That the plaintiff, pursuant to the terms of the Lease Agreement exercised its option to purchase the said property by letter dated July 20, 1974, a copy of which is attached hereto, the terms of which are incorporated herein, and is marked Exhibit 5. The letter requested that the defendant select [a] Sales Agreement, Exhibit 2 or Exhibit 4, or a proper substitute therefore [sic] which he would execute, to execute that agreement, and return it to the plaintiff so that the plaintiff could arrange for settlement.

5. That the plaintiff has fully performed all things required by the Lease Agreement to execute his option but that the defendant has failed and refused to execute the Sales Agreement or to proceed to settlement and to convey the property in accordance with the terms of the Lease Agreement or Sales Contract.

* * * * *

Based on those allegations, plaintiffs sought:

1. That the purchase option and the Lease Agreement be specifically enforced.

2. That the Lease Agreement be specifically enforced.

3. That the Sales Agreement properly attached to the Lease Agreement be specifically enforced.

4. That a trustee be appointed to convey said property to plaintiff.

5. That the defendant be required to finance the property in accordance with the terms of the Sales Agreement.

6. That the defendant, pursuant to Maryland Rules 370b4 and 372e be required to verify his answer to this petition.

7. That the plaintiff have such other and further relief as the case may require.

Plainly, whether Yachts properly exercised the purchase option was of critical importance to the equity litigation.

The October 8, 1975, consent decree which terminated the equity litigation entered a money judgment of $300,000 in Yachts' favor against Fort Washington, de-

nied specific performance as no longer available, and further ordered:

> * * * that all other claims, counts, counter-claims, and/or all other issues of any nature whatsoever, be, and the same are hereby dismissed with prejudice; * * *

Inasmuch as the consent decree does not hold specifically that Yachts properly exercised the purchase option, the "all other issues * * * be * * * dismissed with prejudice" language constitutes a final judgment *against* Yachts on that issue. Plaintiffs cannot seriously argue that this identical issue is not present in the Count I ownership claim. Without proper exercise of the purchase option, Yachts can claim no ownership of the property. Nor does Yachts seriously contend on this record that it lacked full and fair opportunity to litigage this critical issue. Under the criteria we set out in *Carter-Wallace, supra*, it would appear plaintiffs in the present litigation should be collaterally estopped from asserting proper exercise of the purchase option.

This result is not altered by the fact that this decree was entered on the parties' consent. In *Green* v. *Ancora-Citronelle Corp.*, 577 F. 2d 1380 (9th Cir. 1978), the court addressed this very contention, holding:

> There is no question here that the prior state court judgment was a final judgment on the merits of the issues raised in that action. The fact that this judgment was the result of the parties' stipulation of settlement does not detract from its being considered a conclusive determination of the merits of that action for purposes of collateral estoppel where, as here, it is clear that the parties intended the stipulation of settlement and judgment entered thereon to adjudicate once and for all the issues raised in that action. 1B Moore's Federal Practice ¶ 0.444[1](2d ed. 1974).[577 F. 2d at 1383.]

See generally Red Lake Band v. *United States*, 221 Ct. Cl. 325, 331-333, 607 F. 2d 930, 934 (1979); 1B Moore's Federal Practice ¶ 0.44[3], at 4009-4024 (2d ed. 1980).

We have already set out the broad language contained in the consent decree precluding further suit. Similar farreaching, preclusive language is contained within the mutual release Yachts and Fort Washington executed:

> *MUTUAL RELEASE AND ASSIGNMENT*
>
> This Mutual Release * * * is intended to effect the extinguishment of any and all obligations, claims, demands, or issues whatsoever (including but not limited to) those [directly] arising out of * * * or indirectly resulting from a certain Lease Agreement entered into on October 30, 1972, by and between FORT WASHINGTON MARINA, INC., and YACHTS AMERICA, INC., and THOMAS BRUCE WILSON, and all sales or other agreements attendant thereto whether written or oral.
>
> Certain disputes and differences have arisen between the parties of the first part and the parties of the second part as a result of the aforementioned agreement or agreements, and the parties have agreed to execute this Mutual Release in settlement of such disputes and differences. In consideration of the mutual relinquishment of their respective legal rights with reference to these disputes and differences, in consideration of the execution of this Mutual Release, * * * each party, for himself, his heirs, successors, and legal representatives or assigns, expressly releases the other, his heirs, successors, and legal representatives or assigns, from any and all liability whatsoever for claims and/or demands of every nature whatsoever from the beginning of the world to the date first above written.
>
> Additionally, and for the elements of consideration aforementioned, the parties of the first part and the parties of the second part for themselves and their

> heirs, legal representatives, and assigns, release and forever discharge each other mutually and reciprocally, from all claims, demands, and causes of action that they now have or that might subsequently accrue to them arising out of or connected with, directly or indirectly, the aforementioned agreements between the parties, including, but not limited to, all claims, actions, or issues as set forth in the litigation between the parties known as Law No. 56019, in the Circuit Court for Prince George's County, Maryland, Law No. 5665, in the Circuit Court for St. Mary's County, Maryland, and Equity No. D-8967, in the Circuit Court for Prince George's County, Maryland.
>
> A Consent Decree has been entered into by and between the parties hereto and filed in the aforementioned proceedings, a copy of which is attached hereto and made a part hereof.

Read together, the consent decree and the mutual release demonstrate with clarity that the parties intended "to adjudicate once and for all the issues raised" in Equity Action D-8967. *Green* v. *Ancora-Citronelle*, *supra*.

Yachts' best argument against this result is that the consent decree constitutes an "implicit" holding that Yachts did exercise the option. If so, these plaintiffs might be entitled to use the decree offensively to establish ownership. *See Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 331. To support their view of the consent decree, plaintiffs point to an interlocutory ruling in the first breach suit, Prince George's County Circuit Court Legal Action No. 56019, that Yachts exercised the option.

That interlocutory ruling, however, simply was never incorporated, or even referred to, in the consent decree resolving the equity action. Interlocutory conclusions, of course, do not constitute final dispositions and neither res

judicata or collateral estoppel arise from them. The cases so holding are legion. *E.g.*, *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1876); *Barrington Manor Apts. Corp.* v. *United States*, 183 Ct. Cl. 312, 320 n.4, 392 F. 2d 224, 228 n.4 (1968); *see* 1B Moore's Federal Practice, *supra* ¶ 0.409[1], at 1001-1012, and cases cited therein. Plaintiffs' suggestion that we read the interlocutory ruling into the final consent decree is tantamount to a suggestion that the interlocutory ruling itself be given collateral estoppel effect. Given the overwhelming authority against the latter proposition, the consent decree must be read as a final determination that Yachts did not properly exercise the purchase option. We so hold.

It follows that collateral estoppel now precludes plaintiffs from relitigating whether the option was properly exercised. Unable to assert equitable ownership of the property, plaintiffs' Count I ownership claim necessarily fails. To that extent, summary judgment in defendant's favor is appropriate on Count I of the petition. We thus need not consider whether res judicata also would preclude the Count I ownership claim. *See* note 1, *supra*.

Plaintiffs' Count II alleges just compensation is owed for a taking of Yachts' leasehold. Less clear is a related assertion in Count II that the United States must pay for certain improvements Yachts made during the tenancy.

Regarding the alleged taking of Yachts' leasehold, the parties agree Yachts continued in possession until the leasehold expired on November 1, 1974, some 17 days after Pub. L. No. 93-444, *supra*, was enacted. The parties appear to dispute, however, whether Government actions during these 17 days deprived Yachts of its leasehold notwithstanding Yachts' continuing possession. As with the Count I business claim, *supra*, we find the present record and argument to scant to decide this or the

related claim of a compensable interest in several improvements to the premises. We therefore remand the Count II claims for further proceedings before a trial judge.

III.

Plaintiffs' final cause of action is that Pub. L. No. 93-444, *supra*, granted them a compensable right to terminate their marina business in an orderly manner. Plaintiffs continue that Pub. L. no. 94-578, *supra*, which subsequently exempted the marina property from the orderly termination provision, constitutes a taking of that supposed right for which compensation must be paid.

In relevant part, Pub. L. No. 93-444, *supra*, provides:

> * * * The Secretary shall allow for the orderly termination of all operations on real property acquired by the United States in parcels A, B, C, and D of this subsection, and for the removal of equipment, facilities, and personal property therefrom: *Provided*, That in no event shall the Secretary allow operations at the Marshall hall Amusement Park to continue beyond January 1, 1980. * * *

Section 305 of Pub. L. No. 94-578, *supra*, provides:

> SEC. 305. Section 2(c) of the Act of October 4, 1961 (75 Stat. 780), providing for the preservation and protection of certain lands in Prince George's and Charles Counties, Maryland, as amended (88 Stat. 1304), is further amended by changing the fifth sentence by deleting "parcels A, B,C, and D" and inserting in lieu thereof "parcels A, B, and C."

We assume *arguendo* that an allowance "for orderly termination," if granted, may be other than a revocable license to operate. We also assume *arguendo* that plaintiffs' Count III claim is not precluded by Yachts' continued possession and operation of the marina property

after the enactment of Pub. L. No. 93-444, *supra*. Nevertheless, plaintiffs are entitled to recover on the Count III claim.

After a careful review of these statutes and their legislative history, we are unable to accept plaintiffs' view that Pub. L. No. 93-444, *supra*, granted a "right" of orderly termination or that Pub. L. No. 94-578, *supra*, revoked such a "right." Particularly revealing are the Reports which accompanied H.R. 13713, which ultimately became Pub. L. No. 94-578, *supra*.

The Senate and the House Reports explain the section 305 exemption identically:

> PISCATAWAY PARK, MD.
>
> This cha .ge is a technical amendment to resolve a misunderstanding that has arisen from the Act in the 93rd Congress which authorized additions to the Piscataway Park. The National Park Service presently intends to terminate the operation of the marina. In reviewing the history of the legislation, it is apparent that there was no intent on the part of the Committee to force the closure of this facility. The concern of the Congress in this case is to protect the view from Mount Vernon. While an expansion of the marina, which woud alter the appearance of this area, would not be acceptable, there is certainly no reason why the existing facility could not continue to provide a worthwhile service in the area. This amendment to the law is designed to permit the continued operation of the marina. Any meaures, such as repainting with an unobtrusive color, which the National Park Service can take to reduce the prominence of the marina as viewed from Mount Vernon would be in keeping with the purposes of the Act. [S. Rep. No. 1158, 94th Cong., 2d Sess. 11-12 (1976); H.R. Rep. No. 1162, 94th Cong., 2d Sess. 6 (1976).]

The technical explanations in the Reports are even more concise:

> Section 305 is a clarifying amendment which provides that the Fort Washington Marina in Piscataway Park, Maryland, continue in operation. [S. Rep. No. 1158, *supra*, at 15; H.R. Rep. No. 1162, *supra*, at 8.]

That the Department of the Interior indeed viewed Pub. L. No. 93-444, *supra*, as *requiring* termination of the marina operation is confirmed by the Department's analysis of the changes section 305 of H.R. 13713 would make:

> *Piscataway Park, Maryland*
>
> Section 305 of the bill would specifically delete Parcel D (the Fort Washington Marina at Piscataway Park) from the phase out requirements of Public Law 93-4444.
>
> It is the opinion of the Solicitor of this Department that the provisions of Public Law 93-444, enacted on October 15, 1974, provide that the operations at Fort Washington Marina should be terminated in an orderly manner. Accordingly, this Department had proposed to phase out the marina. In the House Report (No. 94-1162) the House Committee stated that there was no intent on the part of the Committee to force the closure of this facility in Public Law 93-444. This Department does not object to this subsection of the bill and it welcomes action by the Congress to clarify the status of the marina operation. [Letter from John Kyl, Assistant Secretary of the Department of the Interior, to the Honorable Henry M. Jackson, Chairman of the Senate Committee on Interior and Insular Affairs (July 23, 1976), *reprinted in* S. Rep. No. 1158, *supra*, at 22.]

The inescapable conclusion is not that Congress granted and then withdrew a "right" of orderly termination. Instead, it is that Congress made clear in Pub. L.

No. 94-578, *supra*, that the Interior Department was under no duty by virtue of Pub. L. No. 93-444, *supra*, to terminate Yachts' existing marina operations. The implication, obviously, is that Yact's existing operation was to be dealt with as would other concessions on National Park Service land. We hold that Pub. L. No. 93-444, *supra*, did not create, and Pub. L. No. 94-578, *supra*, did not revoke, a "right" in plaintiffs to orderly terminate the marina operation. Summary judgment in defendant's favor is appropriate on Count III of the petition.

IV.

Remaining for resolution is defendants' counterclaim for reasonable rent since the taking of the marina property.

Yachts apparently continues to occupy the marina property. We have long recognized that one who occupies the premises of another does so, absent contrary agreement, with the implied obligation to pay a reasonable rental therefor. *See, e.g., Niagara Falls Bridge Commission* v. *United States*, 111 Ct. Cl. 338, 352, 7b F. Supp. 1018, 1019 (1948). Similarly, when a lessee holds over without new agreement after the expiration of his lease, the terms of the old lease agreement apply. *See Garrity* v. *United States*, 107 Ct. Cl. 92, 98, 67 F. Supp. 821, 822 (1946). As a defense to the counterclaim, plaintiffs allege, and portions of the record support, that Yachts had an agreement with the National Park Service to occupy the marina property rent free. Portions of the record, however, also support the Government's assertion that it has consistently demanded rent for periods after the enactment of Pub. L. No. 93-444, *supra*, and never entered a no-rent agreement with yachts. Inasmuch as material facts are in dispute, summary judgment for either party as to the counterclaim is inappropriate. We therefore

deny without prejudice defendant's motion for summary judgment and plaintffs' motion for partial summary judgment as to the counterclaim. We remand the counterclaim to a trial judge for further determination.

CONCLUSION

Regarding the present petition's Count I ownership claim Count III claim, we find no issue of material fact exists to preclude summary judgment. After fully considering the parties' submissions, we conclude summary judgment for defendant appropriate on those claims. To that extent, defendant's motion for summary judgment is hereby granted and plaintiffs' motion for partial summary judgment is hereby denied.

However, we conclude issues of material fact render summary judgment inappropriate on the present petition's Count I business claim and Count II claims, as well as defendant's counterclaim. To that extent, defendant's motion for summary judgment and plaintiffs' motion for partial summary judgment are hereby denied without prejudice. The present petition's Count I business claim and Count II claims, as well as defendant's counterclaim, are hereby remanded to a trial judge for further proceedings consistent with this opinion.

NICHOLS, *Judge*, concurring and dissenting:

We must be grateful to Judge Kashiwa for clearing away the fog that surrounded this case, that is, most of it. I join in the opinion except where I indicate specific disagreement.

In view of the holding of the court that plaintiff did not effectively exercise its option and thus became equitable owner, plaintiff does not have a valid Count I claim for destruction of business. In the first place, it is undisputed that it was not destroyed. Congress was willing it should

be continued at the same site, and plaintiff remained in possession, though ostensibly as a tenant at sufferance, until at least the filing of the petition in this court. Secondly, any interference with the business was compensable under the fifth amendment only indirectly, to the extent the land's adaptability to the business was an element to consider in the value of the land; not as a separate item. *Mitchell* v. *United States*, 267 U.S. 341 (1925). The neglect of the parties to tell us much about the business claim is easily explained: it rose or fell with the issue whether plaintiff had exercised its option and became the equitable owner of the real estate.

As the option was not exercised and the lease had only 17 days to run on the taking date, there is nothing left to litigate under Count II. In view of Clause 12 of the lease, entitled *Effect of Condemnation* the leasehold terminated as of the time possession had to be surrendered. If plaintiff did not have to surrender possession, nothing happened to terminate the leasehold and it continued to the end of the lease term. If plaintiff did have to surrender possession, Article 12 cuts off its recovery. Obviously Article 12 was intended to cut off the lessee from claiming a share of the award in case any taker by eminent domain exercised its right to possession and thus interfered with the lease. Article 12 was a bargain that even if this occurred, the condemnation award would all go the lessor. In either case, the cause of action under Count II depends on a valid exercise of the option, just as Count I does, and Count II fails under the court's conclusion the same as Count I.

Count III is based on plaintiff's theory that Pub. L. No. 93-444 cut off the right to "orderly termination," *i.e.*, indefinite occupancy of the site by plaintiff. We have

concluded that it was meant to permit plaintiff to occupy indefinitely. This disposes of Count III.

In my view, therefore, the only issues remaining for trial are those under defendant's counterclaim.

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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-286

THOMAS BRUCE WILSON, *et al.*
Plaintiffs

v.

UNITED STATES OF AMERICA, *et al.*
Defendants

FILED
JUN 23 1983
JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

This action is before the Court on defendants' motion to dismiss. The Court grants defendants' motion, denies plaintiffs leave to amend the complaint, and denies plaintiffs' motion for emergency preliminary injunction, for the reasons set forth below.

The plaintiffs are Yachts America, Inc. and its president, Thomas Wilson. Yachts America operates the Fort Washington Marina (Marina). In 1974, the United States took title to the Marina by Public Law No. 93-444, 88 Stat. 1304. *See Yachts America, Inc.* v. *United States*, 673 F.2d 356 (Ct. Cl.), *cert denied*, 103 S.Ct. 86 (1982).

The plaintiffs seek damages in the total amount of $8 million against the United States, the Secretary of the Interior, the Director of the National Park Service, and the Regional Director of the National Capital Region of the National Park Service. In addition to damages, plain-

tiffs seek equitable relief. By letter dated June 1, 1983, the local regional director of the National Park Service wrote Mr. Wilson:

> "After careful evaluation of all offers [to operate the Marina], we have selected the Piscataway Company as the one submitting the best *offer*. Thus, the National Park Service will immediately *enter into negotiations* with the Piscataway Company for a one-year concession contract."

Exhibit "B" to plaintiffs' emergency motion for preliminary injunction. (emphasis supplied). Mr. Wilson was requested to refrain from entering into agreements for operations that would extend beyond November 1, 1983. *Id.* Plaintiffs seek to enjoin defendants from removing them from the Marina and from granting a concession contract to any other operator.

Plaintiffs have an action pending in the United States Claims Court under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, seeking compensation for the taking of their concession contract and damages for breach of an implied concession contract. That action, in which cross-motions for summary judgment have been briefed, provides an adequate remedy at law for plaintiffs.

Until another concession operator is awarded the concession contract for the Marina, the agency action being challenged is not final, and judicial review of plaintiffs' claims as a disappointed bidder under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, is premature. *Gull Airborne Instruments, Inc.* v. *Weinberger*, 694 F.2d 838, 841 (D.C. Cir. 1982); *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Although plaintiffs suffer some hardship by being told not to enter into agreements for operations after November 1, 1983, the issues are not fit for judicial decision since no award has issued. *See Abbott Laboratories* v. *Gardner*,

387 U.S. 136, 149 (1967); *Gull Airborne Instruments Inc.* v. *Weinberger*, 694 F.2d at 841, 844 n.7.

Plaintiff's claim under the Federal Tort claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, must be dismissed for failure to file an administrative claim. 28 U.S.C. § 2675(a). *Founding Church of Scientology* v. *Director, F.B.I.*, 459 F. Supp. 748, 754 (D.D.C. 1978).

The availability of a Tucker Act action in the Claims Court which plaintiffs have pursued, satisfied the requirements for procedural due process. *See Railroad Retirement Adjustment Cases*, 419 U.S. 102, 156 (1974). It also obviates any need for equitable relief in the nature of mandamus, at least before an award is made. *See Haneke* v. *Secretary of HEW*, 535 F.2d 1291, 1296 n.15 (D.C. Cir. 1976).

Plaintiffs have failed to state a claim upon which relief may be granted against the individual defendants in their personal capacities. No facts have been alleged showing direct involvement by the individual defendants other than the distribution of a prospectus for the Marina concession contract and official correspondence concerning the contract. *Cf. Rizzo* v. *Goode*, 423 U.S. 362, 371, 375-76 (1976). Plaintiffs' action in the Claims Court is predicated upon defendants' acts occurring within the scope of their official duties. To argue otherwise here is inconsistent and unsupported.

The proposed amended complaint and the motion for emergency preliminary injunction fail to cure the jurisdictional defects and lack of ripeness of the original complaint. Accordingly, they are denied. The Court dismisses without prejudice the APA claim in count I of the complaint for lack of ripeness. All other claims are dismissed with prejudice.

An appropriate order is attached.

JUNE L. GREEN
U.S. DISTRICT JUDGE

June 23, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-286

THOMAS BRUCE WILSON, *et al.*
Plaintiffs

v.

UNITED STATES OF AMERICA, *et al.*
Defendants

FILED
JUN 23 1983
JAMES F. DAVEY, Clerk

ORDER

Upon consideration of defendants' motion to dismiss, plaintiffs' opposition, defendants' reply, plaintiffs' emergency motion for preliminary injunction, and the entire record in this action, it is by the Court this 23rd day of June 1983,

ORDERED that defendants' motion to dismiss is granted; it is further

ORDERED that plaintiffs' emergency motion for preliminary injunction is denied, and it is further

ORDERED that this action is dismissed without prejudice as to plaintiffs' claim under the Administrative Procedure Act in count I of the complaint and with prejudice as to remaining claims.

JUNE L. GREEN
U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-286

THOMAS BRUCE WILSON, *et al.*

Plaintiffs

v.

UNITED STATES OF AMERICA, *et al.*

Defendants

FILED
AUG 15 1983
JAMES F. DAVEY, Clerk

MEMORANDUM ORDER

Plaintiffs seek reconsideration of the Court's order dismissing this action on June 23, 1983. Plaintiffs contend that Pub. L. No. 93-444, 88 Stat. 1304 (1974) granted Yachts America, Inc. the right to remain operator of the Fort Washington Marina (Marina) indefinitely. Under this interpretation, defendants have violated this federal law by serving notice of eviction and entering into negotiations with another company for a contract to operate the Marina.

The Court agrees that if plaintiffs' view of Pub. L. No. 93-444 is accurate, jurisdiction would exist in this Court based on violation of a federal statute. *See Megapulse* v. *Drew Lewis, Secretary of Transportation*, 672 F.2d 959 (D.C. Cir. 1982). However, plaintiffs err in so interpreting Pub. L. No. 93-444. Contrary to plaintiffs' claims, *Yachts America, Inc.* v. *United States*, 673 F.2d 356 (Ct.

Cl.) *cert. denied*, 103 S.Ct. 86 (1982), rejected plaintiffs' theory. The majority opinion of the *Yachts America* court held:

> . . . Congress made clear in Pub. L. No. 94-578 (90 Stat. 2732 (1976)), that the Interior Department was under no duty by virtue of Pub. L. No. 93-444 to terminate Yachts' existing marina operations. The implication, obviously, is that Yachts' existing operation was to be dealt with *as would other concessions on National Park Service land*. We hold that Pub. L. No. 93-444 did not create, and Pub. L. No. 94-578 did not revoke a 'right' in plaintiffs to orderly termination of the marina operation.

(Emphasis added) *Id.*, at 364. Plaintiffs cited *dictum* from the concurring and dissenting opinion which obviously did not constitute the reasoning of the majority.

Plaintiffs contend also that count II should have been dismissed, if at all, without prejudice, because the United States Claims Court may have ancillary jurisdiction. Count II sought to require defendants to deal with plaintiffs as they would have dealt with similar concessions by, *inter alia*, requiring defendants to enter into a concessions contract with plaintiffs. This claim was based on plaintiffs' erroneous interpretation of Pub. L. No. 93-444 as granting them a right to indefinite operation of the Marina. Plaintiffs chose to bring their claim in this Court and count II was dismissed properly with prejudice. Dismissal of count II does not prevent plaintiffs from filing an action as a disappointed bidder.

Last, plaintiffs contend that their lawsuit in the United States Claims Court constituted filing of an administrative claim sufficient to create jurisdiction under the Federal Tort Claims Act, 28 U.S.C. § 2675(a). As defendants pointed out, plaintiffs' lawsuit in the Claims Court was not predicated on the Federal Tort Claims Act or on

any theory of negligence. Plaintiffs did not seek a sum certain nor did they first present the claim to the appropriate administrative agency. For all these reasons, plaintiffs failed to state a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.*, by their lawsuit in the United States Claims Court. *See Best Bearings Co.* v. *United States*, 463 F.2d 1177, 1179 (7th Cir. 1972); *Founding Church of Scientology* v. *Director, F.B.I.*, 459 F. Supp. 748, 755 (D.D.C. 1978).

Accordingly, upon consideration of plaintiffs' motion for reconsideration, defendants' opposition, plaintiffs' reply, and the entire record in this action, it is by the Court this 15th day of August 1983,

ORDERED that defendants' motion for leave to file opposition out of time is granted; and it is further

ORDERED that plaintiffs' motion for reconsideration is denied.

JUNE L. GREEN
U.S. DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1983

[No Opinion]

Civil Action No. 83-00286

No. 83-1916

THOMAS BRUCE WILSON, *et al.*
Appellant

v.

UNITED STATES OF AMERICA, *et al.*

Appeal from the United States District Court for the District of Columbia

Before WRIGHT, EDWARDS, and SCALIA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The issues presented have been fully considered by the court; they occasion no need for an opinion. *See* D.C. Cir. R. 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the Dis-

trict Court appealed from in this cause is affirmed in all respects except as to Count I of the complaint, which is remanded to the District Court with instructions to dismiss that count on the merits.

It is FURTHER ORDERED by this court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 14, as amended November 30, 1981 and June 15, 1982.

United States Court of Appeals
for the District of Columbia Circuit

Per Curiam
For the Court
GEORGE A. FISHER
Clerk

FILED APR 16 1984

GEORGE A. FISHER
Clerk